IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 35 OF 2005
IN
REVIEW PETITION NO. OF 2005
IN
SECOND APPEAL NO. 675 OF 2003

Smt. Yamunabai w/o. Kisanrao Shinde & Ors. ..Applicants
(Ori. Appellants)

versus

Swati Khanderao Shinde & Ors. ..Respondents

Mr. P. K. Dhakephalkar i/b. N. P. Shimpi for the Applicants - Original Appellants.

Mr. R. M. Pethe for the Respondent No.1.

CORAM : D. G. DESHPANDE, J.

DATE : 4TH AUGUST, 2006

P.C. (IN CHAMBER) :

1. Heard Counsel for the Applicants - Original Appellants and Respondent No.1. None of them took objection that first application for condonation of delay should be heard and then review petition. Both made their submissions on the review petition directly without referring to the condonation of delay application, and therefore, I had condoned the delay. Application No. 35 of 2005 for condonation

of delay, is allowed and disposed of accordingly.

2. So far as review petition is concerned, it is in respect of my order dated 7.10.2003. Counsel for the appellants contended that deceased Khanderao in a Suit filed before the Civil Judge, Junior Division in Regular Darkhast No. 628 of 1968 i.e. suit filed by his wife for maintenance, filed a written statement contending therein that Ganu Shinde Cold Drink House was an ancestral property. According to him, this stand of Khanderao is contrary to the suit agreement and therefore the appellate court should have considered this.

3. As against this, Mr. Pethe, pointed out an agreement executed between Khanderao and Daulatrao dated 10.5.1963 i.e five years before Khanderao's wife filed Civil Suit for maintenance. In that agreement Khanderao is a purchaser and Daulatrao is a seller. There is a statement that Daulatrao is exclusive owner of Ganu Shinde Cold Drink House, so far as Cold Drink House is concerned but not the property because the property is tenanted.

4. This agreement is five years before the

filing of the Civil Suit by wife and it is clear that in order to defeat the claim of his wife Pratibha, Khanderao raised the defence. Now, therefore, parties cannot be permitted to bang upon that written statement.

5. The next point that was submitted that the agreement between Yamunabai and Khanderao was not enforceable. When questioned, Mr. Dhakephalkar admitted that this point was not raised before the trail court or before the Appellate court. But according to him, this point goes to the root of the matter. This submission cannot be accepted. When the parties are fighting with each other since 1971 because the suit is of 1971, they have contested the matter on all counts raising different defences, then, the appellants now cannot be permitted to take a totally new ground for which there was no basis in the written statement nor any pleading nor any attempt was made to lead evidence. For all these reasons, the Review Petition is dismissed. Office to number the Review Petition.

(D.G. DESHPANDE, J.)